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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Amendment of the Commission's Rules to Establish Competitive Service Safeguards for Local Exchange Carrier Provision of Commercial Mobile Radio Services	)	WT Docket No. 96-162

COMMENTS OF COX COMMUNICATIONS, INC.

Cox Communications, Inc. ("Cox"), by its attorneys, hereby submits its comments on the Notice of Proposed Rulemaking in the above-captioned proceeding.[1/] As acknowledged in the Notice, Cox has been urging the Commission to establish meaningful safeguards for incumbent local exchange carrier ("LEC") provision of commercial mobile radio services ("CMRS").[2/] The existing cellular structural separation rules in Section 22.903 are the best safeguards available to the Commission and thus should be extended to all Tier 1 incumbent LEC in-region CMRS. Expanded accounting and CPNI/joint marketing safeguards also are needed, especially if the Commission declines to extend structural separation to all CMRS providers. If a separate affiliate for incumbent LEC provision of in-region CMRS, as proposed in the Notice, is used, it will be effective only if additional safeguards are adopted.

1/ See, Notice of Proposed Rulemaking, Order on Remand, and Waiver Order, WT Docket No. 96-162, GEN Docket No. 90-314, FCC 96-319 (released August 13, 1996) (the "Notice").

2/ See, e.g., Notice at ¶ 29 and ¶ 100.

I. STRUCTURAL SEPARATION IS THE SIMPLEST, LEAST REGULATORY SAFEGUARD METHOD AVAILABLE.

The Notice recognizes that structural separation has been a simple, easy to administer way to protect against market power abuse. The current Bell Operating Company ("BOC") cellular structural separation requirements were imposed in recognition of the BOCs' dominant market position in the local exchange and exchange access markets. The cellular structural separation rule prevents the BOCs from leveraging their local exchange dominance into cellular service markets. As the Commission acknowledges, the structural separation requirements:

> were specifically intended to protect BOC local exchange ratepayers by preventing cross-subsidization of the more competitive cellular service, and to prevent discriminatory interconnection practices with respect to the non-wireline cellular provider by requiring that the wireline and non-wireline entities exist independently from one another with respect to facilities, operations, management and other personnel. With respect to both cross-subsidization and interconnection, structural separation was believed to permit easier detection and disclosure of improper activities, and to reduce unnecessary regulatory intrusion into competitive or unregulated operations.[3/]

While there is potential for substantially increased CMRS competition since the Section 22.903 structural separation requirements were enacted, one thing has stayed the same: The BOCs still have dominant market power in their in-region local exchange markets. Indeed, as the Commission continues in the Notice, "we have recently found that our existing LEC/CMRS interconnection rules and policies are insufficient to protect against discriminatory interconnection practices and rates, and have tentatively concluded that further regulatory oversight and intervention will be needed for some time in the future in order to prevent LECs from abusing their position of control over interconnection to the public switched telephone network."[4/]

3/ Notice at ¶ 37.

4/ Notice at ¶ 34.

In view of the acknowledged, continued need for regulatory oversight and the success of BOC-cellular structural separation, the Commission should not be so eager to abandon a regulatory regime that works. Rather, the Commission should embrace structural separation as the best mechanism to prevent cross-subsidy and other abuses. Under structural separation, BOC cellular entities have enjoyed astonishing success, and the purported "cost savings" and "efficiencies" of integrated LEC wireless wireline activity have yet to be shown.[5/] Further, the BOC argument that structural separation creates a skewed competitive market is no longer valid because Congress granted the chief BOC request — to joint market wireless and wireline services — in the Telecommunications Act of 1996.[6/] Moreover, in the few months since enactment of the 1996 Act, there has been little change in the market for wireline local telephony services, which means that the basic justification for separation remains intact.

Consequently, the burden of proof should rest on those who advocate abandoning the successful structural separation regime. In other words, until the BOCs prove that the costs of structural separation outweigh the competitive benefits, the Commission should not abandon structural separation and should expand it to apply to all Tier 1 LEC in-region CMRS. Structural separation requirements should be used until the wireline local exchange market is truly competitive, based on an affirmative showing by an incumbent LEC that it no longer has in-region market power.[7/]

5/ "Although the BOCs have alleged that there are cost savings to be realized from integrated operations, they have not presented a quantification of either the magnitude of these overall benefits, or the costs to the BOCs to continue to maintain structurally separate corporate affiliates for cellular service." Notice at ¶ 52.

6/ See Notice at ¶¶ 61-64. See also Telecommunications Act of 1996, Pub. L. 104-104, 110 Stat. 56 (the "1996 Act").

7/ An arbitrary date certain for the elimination or "sunset" of the safeguards must be avoided. Rather, the Commission must make an affirmative determination, either in a rulemaking or on a case-by-case basis, that conditions have changed in the wireline and wireless

(continued...)

II. ENHANCED ACCOUNTING AND CPNI SAFEGUARDS SHOULD BE ADOPTED, ESPECIALLY IF A SEPARATE AFFILIATE REGULATORY REGIME IS USED.

Despite the apparent success of Section 22.903, the Commission does not propose to expand its use to all broadband CMRS.[8/] Instead, the Commission proposes to adopt the concept of a "separate affiliate," using as a model Pacific Bell's proposed PCS nonstructural safeguards plan. The Pacific Bell plan, however, is inadequate to protect wireless competition. Cox and others pointed out the inadequacies of the Pacific Bell plan when it was filed, yet the Notice fails to address those concerns.[9/] Regardless of whether the Commission determines to retain and expand structural separation, it must adopt additional safeguards as discussed below. Any rules adopted should stay in place until facilities-based competition in the wireline local exchange market is well developed.[10/]

7/ (...continued)
marketplaces before safeguards are eliminated.

8/ Concerns about regulatory parity and the Sixth Circuit's decision in Cincinnati Bell need not prevent the Commission from expanding the coverage of Section 22.903 to all BOC in-region broadband CMRS activity. Cincinnati Bell questioned the Commission's differing treatment of cellular and PCS, and expansion of Section 22.903 to PCS would meet this concern. Expansion of the Section 22.903 requirements to all Tier 1 LECs also would be appropriate, but is not necessary to meet the Sixth Circuit's mandate. Non-BOC Tier 1 LECs do not share the large, contiguous combined wireless and wireline coverage enjoyed by the BOCs. Thus, they are distinguishable from the BOCs and could be subject to a different regulatory regime. Finally, Pacific Bell, the only BOC operating an in-region broadband CMRS network outside of the Section 22.903 requirements, knew that its PCS operations potentially were subject to additional safeguards requirements, and thus could not claim to be surprised by a change in the regulatory regime.

9/ Instead, discussion or analysis of objections to the Pacific Bell PCS nonstructural safeguards plan is contained in Appendix B to the Notice, and the Commission made no attempt either in the body of the Notice or in Appendix B to address those objections. Procedurally, if the Commission intends to adopt Pacific Bell's plan as a guide, as stated in the Notice, it must explain what additional safeguards it will adopt to meet the concerns expressed.

10/ Any rules adopted also should apply to all incumbent LEC in-region broadband
(continued...)

A. Separate Affiliate.

The Notice observes that "in light of the many separate affiliate requirements in the 1996 Act, it is evident that Congress has concluded as a general matter that such requirements, together with associated nondiscrimination safeguards, constitute an appropriate initial safeguard for BOC entry into the provision of certain competitive services, which can be phased out as markets become more competitive."[11/] Cox agrees that such safeguards are critical. At the very least, LEC in-region CMRS should be provided through a corporate affiliate that is separate from the local exchange carrier. The Competitive Carrier separation conditions are an appropriate start,[12/] and could be sufficient if the additional accounting, consumer privacy and marketing safeguards discussed below are adopted and if the officers and directors of the separate affiliate certify on an annual basis that they are adhering to the safeguards requirements.

B. Accounting Safeguards.

The Notice proposes to use current Part 64 rules governing the allocation of LEC costs, in conjunction with the Part 32 rules on the uniform system of accounts, as the basis for the initial review of a carrier's nonstructural safeguards plan.[13/] The Part 64 rules, however, are inadequate for purposes of disclosing LEC investments in common carrier-type non-regulated activities that may create substantial common costs. As LEC investments in plant used jointly

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10/ (...continued)
CMRS regardless of the amount of spectrum used. There should be no arbitrary lower limit on the amount of broadband spectrum an incumbent LEC may hold before it becomes subject to the requirement. See Notice at ¶ 114. Avoidance of an arbitrary spectrum limit is important because advances in digital technology are making it possible to offer traditional two-way voice service using ever smaller bandwidths.

11/ Notice at ¶ 40 (emphasis added).

12/ See Notice at ¶ 118.

13/ Notice at ¶ 120.

for wireline, wireless, video and other services increases, Part 64 will not provide interested parties with sufficient information to detect cross-subsidization.

Under Part 64, the separation of regulated and non-regulated costs is reflected in just two lines on ARMIS reports. One of these lines shows the total of "other nonoperating income;" the other shows the total of "investments in affiliated companies."[14/] The purpose of this abbreviated summary reporting was to "keep regulated common carriers from using the revenues from their regulated services to subsidize nonregulated enterprises and . . . ensure that ratepayers receive their appropriate share of the benefits arising from the offering of regulated and nonregulated services on a structurally unseparated basis."[15/]

This abbreviated accounting treatment is not appropriate for CMRS. The scant summary of costs required under current Part 64 cost accounting rules provides the Commission and other interested parties virtually no information about the wide range of potential investments grouped together under "other nonoperating income" and "investments in affiliated companies." Without further detail it is impossible to identify CMRS costs. Further, because these rules require allocation of costs only between common carrier and non-common carrier services using a carrier's own forecast of relative use, there is no way to know that costs are in fact reasonably allocated. The Commission and third parties reviewing the filings have no meaningful way to challenge the carrier's forecast, even if it is manifestly unreasonable. Finally, even assuming the Commission modifies Part 64 to require the LECs to break out CMRS costs from monopoly landline and other investments, the Commission has no policy directing LEC determinations of what constitutes a CMRS cost as opposed to a telephone cost for purposes of assessing common costs.

14/ See 47 C.F.R. § 32.7360.

15/ Report and Order, 2 FCC Rcd 1298, 1307 (1987).

To ensure proper separation of incumbent LEC wireless and wireline costs, the Commission must require LECs to disclose fully all costs and revenues associated with CMRS in their ARMIS reports on a line-item basis so that cross-subsidization would be detectable on inspection. Disclosure requirements must be imposed on all LEC affiliates involved with CMRS activity, not merely on the CMRS licensee itself, to avoid corporate structures that otherwise would allow LECs to camouflage their true CMRS costs.[16/]

It also is critical for the Commission to establish specific guidelines for LEC-CMRS cost allocation. The question of what is or is not a CMRS cost should not be answered by the LECs alone because the LECs retain significant incentives to misallocate costs. Moreover, federal and state regulators must have access to sufficient financial data to make informed decisions on what costs properly should be included in the telephone rate base.

C. CPNI and Joint Marketing.

Congress permitted LECs to joint market CMRS and landline service in Section 601(d) of the Telecommunications Act of 1996. The intent of this Section was to "help put the Bell operating companies on par with their competitors."[17/] Consequently, when the incumbent LECs joint market, they should do so from a position that does not disadvantage other competitors. Strict limitations on incumbent LEC use of customer proprietary network information ("CPNI") are central to any attempt to keep the CMRS industry competitive. The Commission should adopt strong CPNI rules regardless of its actions on structural separation.

16/ The BOCs have a history of using corporate structures to avoid regulatory obligations. Some, such as BellSouth, have shifted directory operations to "unregulated" subsidiaries to attempt to shield Yellow Pages revenues from state regulators. More recently, Ameritech and others have attempted to create "new entrant" local exchange subsidiaries to avoid dominant carrier regulation.

17/ 141 Cong. Rec. H8456 (daily ed. August 4, 1995) (Statement of Mr. Burr).

The Notice explains that new Section 222(c)(1) does not allow unrestricted LEC access to customer CPNI.[18/] This is correct. LECs can joint market their wireless and wireline services, but they should be prohibited from using their access to CPNI in such joint marketing efforts. CPNI gained in the provision of incumbent LEC monopoly service should not be permitted to be used to market wireless services unless the LEC obtains written customer authorizations that (1) are separate from any promotional or other material sent by the requesting LEC; (2) are separate from any customer incentive plan or other inducements; (3) are signed and dated by the telephone subscriber; (4) have readable print of a sufficient size with legible type; (5) have unambiguous language confirming the customer's billing name, address and each telephone number covered by the CPNI request; (6) state that the customer is under no obligation to release his or her CPNI; and (7) explicitly state that the customer is knowingly allowing the disclosure of his or her CPNI despite having no obligation to do so. Blanket consents should be invalid; release of CPNI information must be obtained separately for each type of incumbent LEC service. Most important, the rules should make it no easier for an incumbent LEC's CMRS affiliate to obtain access to CPNI than it would be for an unaffiliated CMRS provider.

There are several reasons why it is critical to put Tier 1 LEC CMRS affiliates in the same position as unaffiliated CMRS providers. First, the current monopoly position of Tier 1 LECs effectively means that most consumers have no opportunity to respond to the abuses of CPNI by, for instance, changing carriers. This gives incumbent LECs an opportunity for abuse. The opportunity for abuse is significant because CPNI is fundamentally different from other types of demographic or consumer information because it reveals key data regarding a consumer's telecommunications needs. Moreover, some CPNI — such as data regarding calls made to a competitor — is particularly competitively sensitive. In addition, through Section 222, Congress has recognized the unique privacy issues associated with CPNI. These concerns should make

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18/ See Notice at ¶ 71.

the Commission wary of proposals that would give BOC affiliates, including their CMRS affiliates, access to CPNI on terms that are more favorable than those available to third parties.

With strong CPNI rules in place, the Commission could allow incumbent LECs to joint market wireless and wireline services as proposed in the Notice.[19/] Without such rules, the Congressional intent behind Section 601(d) would be shattered because the incumbent LECs would not be operating "on par" with their competitors. Rather, incumbent LECs with unfettered access to wireline CPNI would be operating with a huge advantage in comparison with their wireless competitors. Incumbent LECs must not be permitted to leverage their years of monopoly power in the wireline telephony business into dominance in the wireless industry through unfair usage of CPNI.

III. CONCLUSION.

Incumbent LECs cannot be treated the same as other wireless providers because they are not the same. No other wireless provider has the historical capital, plant and equipment, and human resource advantages of an incumbent LEC, let alone control of bottleneck facilities essential to providing wireless service. Any regulatory framework that does not account for the presence of these overwhelming advantages will discourage wireless competition, contrary to the Commission's policy objectives. Wireless safeguards also are necessary to promote wireline-wireless competition.

The Commission must not cast aside the regulatory safeguard model embodied in Section 22.903, which has protected cellular competition and permitted the BOCs to develop flourishing wireless businesses. The success of structural safeguards has been due at least in part to their non-intrusive nature. Because of the complete structural separation requirement, elaborate accounting manuals and regulatory oversight are rendered unnecessary. Structural separation is,

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19/ Notice at ¶ 64.

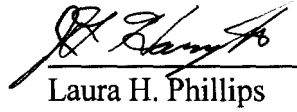
therefore, the least "regulatory" option available to the Commission. Accordingly, structural rules should be retained for in-region BOC cellular entities, and should be expanded to include all in-region Tier 1 LEC provision of both cellular and broadband CMRS services. These rules should remain in force until LEC market power is eliminated.

Regardless of the regulatory regime adopted, the Commission must adopt expanded accounting and joint marketing restrictions. The Commission also should adopt specific CPNI safeguards, regardless of whether it continues the structural separation regime. In either case, prompt action to adopt rules on incumbent LEC safeguard issues is vital. Without adequate policies, the incumbent LECs will leverage their monopoly power from their wired networks into new markets and into the wireless industry. The Commission must not allow the LECs to succeed in preserving their monopoly power at the expense of consumers and the public interest.

For all these reasons, Cox Communications, Inc. respectfully requests that the Commission adopt rules consistent with the positions described herein.

Respectfully submitted,

COX COMMUNICATIONS, INC.



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